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No. 85-264

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

IRVIN M. CARBALAN,

Petitioner,

versus

BILL VAUGHN, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Honorable Court should deny Petitioner's application for Writ of Certiorari because:

(1) The question presented by Petitioner has been disposed of by the trial court and 5th Circuit Court on procedural grounds and is not preserved by Petitioner.

(2) City Judge Bagley's judicial acts should not be imputed to the City of Buffalo under the theory that such acts and edicts fairly represent the policy of the City of Buffalo.

(3) Petitioner failed to discharge his burden of proving and obtaining a finding that Judge Bagley's refusal to accept auto club membership cards as bail, was of sufficient gravity to constitute a constitutional deprivation under 42 U.S.C. Sec. 1983.

LIST OF INTERESTED PARTIES

(1) Irvin M. Carbalan, Petitioner,
Buffalo, Texas 75833

(2) City of Buffalo, Texas, Respondent
Buffalo, Texas 75833

(3) Mayor H. L. Burke
Mayor of City of Buffalo
Buffalo, Texas 75833

(4) Judge Ben Bagley (Deceased)
Municipal Judge of
City of Buffalo, Texas

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STATEMENT OF JURISDICTION

Respondents agree that this Honorable Court has jurisdiction.

———o———

STATUTES CONSTRUED

42 U.S.C. Sec. 1983

42 U.S.C. Sec. 1988

Rule 51, Federal Rules of Civil Procedure

———o———

STATEMENT OF THE CASE

The statement of the Petitioner is correct, except his statement that, "Petitioner requested that the court charge the jury that the City's defacto policy includes the acts of those whose acts and edicts fairly represent the policy of the City of Buffalo. The court refused this instruction," which statement is denied. (See analysis of record in body of brief.)

The court of appeals affirmed on other grounds and added that a verdict against the City would have been impermissible as a matter of law. Respondent says the court of appeals was correct on all counts.

———o———

Reason 1 Why The Application For Certiorari Should Be Denied

Restated

The question presented by Petitioner has been disposed of by the trial court and 5th Circuit Court on procedural grounds and is not preserved by Petitioner.

ARGUMENT UNDER #1

The point raised by Petitioners here was not reached in the trial court because of procedural matters. Petitioners did not raise the question of the City's liability because of the "acts of those whose acts and edicts fairly represent the policy of the City of Buffalo" until the day of trial, by amended petition filed on that day. The court refused for filing portions of the amended petition. The record is unclear whether or not this part of the amended pleading was permitted or not. This petition also alleged that the City of Buffalo was ". . . liable pursuant to a defacto policy of the City of Buffalo. . . ." As stated in Petitioner's application for writ "the issue of the City's liability was submitted with Petitioner's instruction. . . ."

The court submitted the following issue:

> "Do you find that the City of Buffalo, Texas, had a policy approving such action of Judge Ben Bagley, if you have so found" to which the jury answered 'no'."

Petitioner did not request any other form of submission of the City's liability, did not suggest a correct instruction and did not object specifically to the court's submission of this issue.

The court's charge was as follows: ". . . Plaintiff's claims are basically as follows: . . . to allow him a drink of water or wash his face and that Defendant Vaughn's alleged acts were due to a defacto policy of the City of Buffalo, Texas. . . ." (R. Vol. V, P. 377, Line 16 to Page 378, Line 3) *Plaintiff's objection to this charge* was that following the words ". . . defacto policy of the City of Buffalo, Texas, that the court should have added the words 'or such refusal was due to acts of those whose acts and edicts fairly represent the policy of the City of Buffalo.' "

Again the *court's charge was*: Plaintiff's claims are basically, "Second, that on or about March 31, 1980, Plaintiff Carbalan was denied his constitutional right to reasonable bail and unreasonably detained in custody by Judge Ben Bagley's refusal to honor the motor club cards tendered by Carbalan in lieu of cash bond, and setting bail in an unreasonable amount, and that these acts were due to a defacto policy of the City of Buffalo, Texas." (R. Vol. V, P. 378, Line 5 through line 11) *Plaintiff objected* and suggested that there be added to that "or as a result of the acts of those whose acts and edicts fairly represent the City of Buffalo."

Again the court's charge was: "*Regarding Plaintiff's claims*, he asserts that the City of Buffalo, Texas is liable because its mayor and city council allowed such constitutional violations as alleged by Plaintiff to occur as a defacto policy of the city." *Plaintiff's objections suggest* that there should be added to the above, "or as a result of the acts of those whose acts and edicts fairly represent the policy of the City of Buffalo." (R. Vol. V, P. 381, line 5 through line 9)

It is seen from an examination of Plaintiff's objections to the charge as set out in the above statement that his suggested changes in the charge concerned only those portions of the charge dealing with the court's preliminary statement to the jury about what the parties were claiming. At no time did the Plaintiff's objections request the court to state to the jury, as a matter of law, that "official municipal policy could be established by the 'acts of those whose acts and edicts fairly represent official policy.'" Plaintiff's objections only suggested that the court change his language or rather add to his language when the court was explaining to the jury *what the Plaintiff claimed.*

It was completely immaterial whether or not the court stated exactly what Plaintiff claimed. If the court had made some error in stating to the jury the substantive law, that would have been one thing, although the statement requested by the Plaintiff probably does not correctly reflect the true substantive law in this case. It is an entirely different matter to call upon the court to add something to what the court states concerning Plaintiff's contentions. This in no way could mislead the jury. The jury, of course, is bound by what the judge tells them about the law, but certainly the jury is not bound and should not be influenced by what the Plaintiff or Defendants claim.

At no time did the Plaintiff request the court to charge the jury, as a matter of law, that municipal policy could be established by the acts of those whose acts and edicts fairly represent official policy. Plaintiff pled: "The actions of Defendants, Bill Vaughn and Ben Bagley, resulted from and were taken pursuant to a defacto policy of the

City of Buffalo, Texas, which is implemented by the City Marshall and City Judge of the City to summarily punish persons who refuse to obey police orders . . .'' (R. Vol. I, Page 150)

So, the court's instruction to the jury as to what Plaintiff claimed was exactly in the terms of Plaintiff's pleadings and the judge was not obliged, in telling the jury what Plaintiff claimed, to add the very questionable words requested by Plaintiff in his objection to the charge.

Rule 51 of the *Federal Rules of Civil Procedure* specifically requires that in order for a party to assign error to the failure to give an instruction, that he must properly and specifically object to the instructions, stating distinctly the matter to which he objects and the grounds for his objection. Failure to object to the court's refusal to give proposed instructions precludes review of the issue. *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376 (5th Cir. 1983). When an issue is not requested in the proper form to the trial court, any error is waived. *Savoie v. Otto Candies, Inc.*, 692 F.2d 363 (5th Cir. 1982). His objections can be entertained now only if the trial court made a grave error leading to a miscarriage of justice. *Henderson v. U.S. Fidelity and Guaranty Co.*, 693 F.2d 1196 (5th Cir. 1982); *Meyers v. Moody*, 693 F.2d 1196 (5th Cir. 1982).

Rule 51 of the *Federal Rules of Civil Procedure* requires that an objection be sufficiently specific to bring into focus the precise nature of the alleged error. *Wilson v. Crosshines Co.*, 556 F.2d 870, 875 (8th Cir. 1977) cert. denied, 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977), quoting *Palmer v. Hoffman*, 318 U.S. 109, 199, 63 S.Ct.

477, 487, 87 L.Ed. 645 (1943). The purpose of Rule 51 is to compel litigants to afford the trial court an opportunity to correct any error in the instructions and to prevent the losing party from obtaining a new trial through relying on a possible error in the original trial. *Lange v. Schultz,* 627 F.2d 122, 128 (8th Cir.1980). *Johnson v. Houser,* 704 F.2d 1049 (8th Cir. 1983). The mere tender of an alternative instruction without objecting to some specific error in the trial court's charge to explaining why the proper instruction better states the law does not preserve the error for appeal. *United States v. Hecht,* 705 F.2d 976, 82-1842 (8th Cir. 1983); *United States v. Parisien,* 574 F.2d 974, 976 (8th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 154, 58 L.Ed.2d 154 (1978); *United States v. Phillips,* 522 F.2d 388, 391 (8th Cir. 1975). Error in the instructions not properly objected to is waived unless the error is plain error in the sense that a miscarriage of justice would otherwise result. The plain error exception is narrow and confined to the exceptional case in which error has affected seriously the fairness, integrity or public reputation of judicial proceedings. *Rowe International, Inc. v. J/B Enterprises, Inc.,* 647 F.2d 830, 835 (8th Cir. 1981); *Wright v. Farmers Co-op,* 620 F.2d 694 (8th Cir. 1980); *Henderson v. U. S. Fidelity and Guaranty Co., supra; Meyers v. Moody, supra.*

It is very doubtful that the requested addition to the charge made in Plaintiff's objections to the charge state the correct law on the subject as applied to this case; certainly it does not state all of the law concerning municipalities' liability under 42 U.S.C. Sec. 1983. The court was under no obligation to give a definition of "defacto policy" unless the Plaintiff submitted the correct defini-

tion of such term and if the court had attempted to give a definition of defacto policy of the City of Buffalo, he would have been obliged to give a complete definition and instruction concerning the law as delineated in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and its progeny. For instance, he would have been required to tell the jury that a municipality is not liable for the acts of its subordinates or employees on the basis of respondeat superior, because that is a distinction which would not have been rendered the municipality liable, and so on.

In evaluating Plaintiff's complaint concerning the court's instructions, we must not only look at Plaintiff's objection or failure to properly object, but also evaluate the end result. Even if there were error here, it would be harmless error when reviewing the instructions as a whole. The court's charge fairly presented the issue to the jury. Plaintiff therefore has no valid complaint as stated in *Caughlin v. Capitol Cement Co.,* 571 F.2d 290 (5th Cir. 1978) at 300:

> In reviewing a district court's instructions to the jury, we consider the charge as a whole in view of the allegations of the complaint, the evidence presented and the arguments of counsel to determine whether the jury was misled and whether it understood the issues presented. *First Virginia Bankshares v. Benson,* 559 F.2d 1307, 1316 (5th Cir. 1977); *Richardson v. McClung,* 559 F.2d 395, 397 (5th Cir. 1977) (per curiam); *Kyzar v. Valedori Doce Novegacai, S.A.,* 464 F.2d 285, 289 (5th Cir. 1972), cert. denied, 410 U.S. 929, 93 S.Ct. 1367, 35 L.Ed.2d 591 (1973). It is axiomatic that the court need not couch its charge in the precise language and form fancied by a litigant's attorney. *Reyes v. Wyeth Laboratories,* 498 F.2d 1264, 1289 (5th Cir.), cert. denied, 419 U.S. 1096, 95 S.Ct. 687,

> 42 L.Ed.2d 688 (1974); *Andry v. Farrell Lines, Inc.*, 478 F.2d 758, 759 (5th Cir. 1973); *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 902 F.2d 347 (5th Cir. 1977), '(t)he test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' *Id.* at 348-49, quoting *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973) . . .

What the Plaintiff did was suggest to the court that when the court was telling the jury what the Plaintiff complained of, he should have added that the Plaintiff also contended liability would result from the "acts of those whose acts or edicts fairly represent the policy" of the City of Buffalo.

In any event, the court's charge: *"Did the City of Buffalo have a policy approving such action of Judge Ben Bagley,"* was broad enough to encompass such claimed *"acts of those whose acts and edicts fairly represent the policy of the City of Buffalo."*

On Petitioner's demand for a jury, the very question here presented was submitted to the jury by the court's Petitioners received an unfavorable jury verdict, which should end his contention.

Petitioner has not preserved his "question presented" for review.

Reason 2 Why The Application For Certiorari Should Be Denied

Restated

City Judge Bagley's judicial acts should not be imputed to the City of Buffalo under the theory that such acts and edicts fairly represent the policy of the City of Buffalo.

ARGUMENT UNDER #2

The trial court resolved the question of the liability of the City of Buffalo for the acts of Judge Bagley by submitting such question to the jury, as set out above. The City should also be held not liable for the same reasons that the Judge was dismissed from the suit; that is because of the nature of the judicial immunity doctrine.

The Fifth Circuit in this case correctly held that "Buffalo was not liable for Judge Bagley's acts as a matter of law."

No case has been cited by Petitioner that holds that a Judge's judicial acts give rise to liability on the political subdivision, within the framework of which he operates.

He cites the case of *Crane v. State of Texas,* 759 F.2d 412, App. for Cert. Pending, which case holds the county of Dallas liable for a policy of the District Attorney in filing misdemeanor complaints without a prior finding by a magistrate of probable cause. It is thought that this holding is incorrect concerning the prosecutional immunity of the District Attorney; however, this holding falls far short of being authority for holding the City of Buffalo liable for the judicial acts of Judge Bagley concerning bond in this case.

It is not clear whether the District Attorney's long-standing policy in *Crane* was considered to be an administrative policy or a judicial policy. There is no question about Judge Bagley's decision. All parties agree that Judge Bagley, himself, was entitled to judicial immunity, for a judicial act.

There is a vast difference between official administrative decisions and official judicial decisions.

The case of *Butz v. Economou,* 98 S.Ct. 2894, 438 U.S. 478, 57 L.Ed.2d 895 (1872) clearly defines this difference. This was suit against the Department of Agriculture and a number of its officials, including federal hearing examiner. *Economou* holds administrative officials have only qualified immunity to suits but federal hearing examiner, because his duties are judicial, has absolute judicial immunity. This honorable court in *Economou* says:

> "in *Bradley v. Fisher,* 13 Wall 335, 20 L.Ed. 646 (1872), the court analyzed the need for absolute immunity to protect judges from lawsuits claiming their decisions had been tainted by improper motives. The court began by noting that the principle of immunity for acts done by judges 'in the exercise of their judicial functions' had been 'the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.' 13 Wall., at 347. The court explained that the value of this rule was proved by experience. Judges were often called to decide '[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings.' id. at 348. Such adjudications invariably produced at least one losing party, who would 'accep[t] anything but the soundness of the decision in explanation of the action of the judge.'

Ibid. 'Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge.' Ibid. If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose 'that independence without which no judiciary can either be respectable or useful.' Id., at 347. Thus, judges were held to be immune from civil suit 'for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction.'" Id., at 354. (98 S.Ct. 2912)

Again, this court in *Economou* says:

"The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* court suggested, 13 Wall., at 348-49, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray,* 386 U.S., at 554, 87 S.Ct., at 1217. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation. (98 S.Ct. 2913)

In the case *Sellers v. Procunier,* 9th Cir., 641 F.2d 1295 (1981), that court also clearly enunciates the rationale of judicial immunity as follows:

"The cases granting absolute immunity to judges recognize that extraordinary reasons are required to justify the drastic step of barring the genuinely wronged individual from any redress against the wrongdoer. The Supreme Court has thus enunciated several policy reasons for striking the balance in these cases in favor of completely shielding the judge from

suits under § 1983. The judge is in a unique posture in the adversary system. His or her sole task is to make impartial decisions in vigorously contested actions, to 'decide "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings".' *Butz v. Economou,* 438 U.S. at 509, 98 S.Ct. at 2912 quoting *Bradley v. Fisher,* 80 U.S. (13 Wall) 335, 348, 20 L.Ed. 646 (1872). The threat of constant litigation against the decision-maker instituted by disappointed litigants is apparent: it cannot be gainsaid that '[t]he loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus.' *Butz v. Economou,* 438 U.S. at 512, 98 S.Ct. at 2913. Judges 'should not have to fear that unsatisfied litigants may hound [them] with litigation charging malice or corruption.'" *Pierson v. Ray,* 386 U.S. at 554, 87 S. Ct. at 1217.

"Thus, the proper functioning and indeed the very survival of any independent, dispute-resolving system requires that the dread of subsequent lawsuits be prevented from becoming a factor in a judge's assessment of the merits of a case. Moreover, the judge's time which would be diverted to contesting such litigation could severely constrict the time available for the performance of his or her primary duties. Absolute immunity, as the Supreme Court has acknowledged, leaves the genuinely wronged person without civil redress. However, broader societal concerns dictate that the balance be struck in favor of freeing judges from the constant fear of retaliatory suits. The alternative of qualified immunity, or no immunity at all, would disserve the public interest, because these officials would still be subject in some degree to vexatious litigation."

The novel policy suggested by Petitioners that Judge Bagley is a policy making official to the extent that the City is liable for the wrongful judicial decisions of Judge Bagley, flies directly in the face of the reasons for judicial

immunity and so erodes such judicial immunity as to totally emasculate it.

If Judge Bagley were faced with casting possible liability upon the City of Buffalo, each time he was called upon to make a judicial decision, he would be "constantly in fear that" unsatisfied litigants may hound [them] with litigation charging malice or corruption" (*Sellers,* Page 1299) and would be in "constant fear of retalitory suits." (*Sellers,* Page 1300)

Based upon the same reason for judicial immunity, the political subdivision, within the frame work of which the Judge operates, should not be held liable for the immune acts of the Judge. Such exposure certainly puts the Judge under the same restraints to independence as his own liability for such acts.

Upon the merits of Petitioner's "question presented" he should fail.

Reason 3 Why The Application For Certiorari Should Be Denied

Restated

Petitioner failed to discharge his burden of proving and obtaining a finding that Judge Bagley's refusal to accept auto club membership cards as bail, was of sufficient gravity to constitute a constitutional deprivation under 42 U.S.C. Sec. 1983.

ARGUMENT UNDER #3

The failure of Judge Bagley to accept two auto club cards, each with limits of $200.00 for a bond set at $407.00 may have been a violation of the Texas Statute, as apparently found by the jury but the violation of a state statute may or may not constitute a constitutional deprivation, under 42 U.S.C. Sec. 1983. *Pennhurst v. State,* — U.S. —, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Holmes v. Wampler, M.D.,* 546 F.Supp. 500, 502 (E.D. Va. 1982); *Smith v. Spina,* 477 F.2d 1140, 1143 (3rd Cir. 1973); *Patricia B. v. Jones,* 454 F.Supp. 18, 21 (W.D. Pa. 1978); *Gonyaw v. Gray,* 361 F.Supp. 366, 368 (D. Vt. 1973).

It is presumed that the trial court interpreted the jury's answer to special issue #4 to be a finding that Judge Bagley violated a state statute but such action did not constitute a constitutional deprivation. Such presumed finding would support his judgment of no recovery by Petitioner. Certainly the slight inconvenience (having to wait 20 or 30 minutes in the court room until his wife arrived to make bail) occasioned Petitioner, by Judge Bagley's refusal to accept the auto club cards together with the jury's findings of no damages, supports the trial court's judgment that the acts of Judge Bagley did not rise to the gravity of a constitutional deprivation.

So Petitioner's completely unsupported assumption that Judge Bagley's refusal to accept Petitioner's auto club cards, rises to the dignity of a constitutional deprivation, is in the face of the findings of the trial court and the court of appeals. Petitioner's further assumption that this one isolated act of Judge Bagley, is sufficient upon which to base a finding of municipal policy of the City of Buffalo is contrary to this Honorable Court's decision in the case of *City of Oklahoma v. Tuttle,* 471 U.S. —, 105 S.Ct. —, 85 L.Ed.2d 791, 53 U.S.L.W. 4639 (No. 83-1919, decided June 3, 1985). Holding that a single incident of excessive force not sufficient proof of a *Monell* municipal policy.

Petitioner did not prove and obtain a finding of a constitutional deprivation; consequently, his "question presented":

> "Is a municipality liable under 42 U.S.C. Sec. 1983, for a deprivation of rights protected by the constitution that is inflicted pursuant to the policies of its municipal court judge."

has no basis in the record for this Honorable Court's consideration.

———o———

CONCLUSION

It is clear from Petitioner's brief in the Court of Appeals that his only concern is to salvage from this trial, attorney's fees under 42 U.S.C. Sec. 1988. As held by the trial court and affirmed by the Court of Appeals, he did not "prevail". Respondent respectfully prays that his application for certiorari be in all things denied.

Respectfully submitted,

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